

W. C. McQuaide, Inc. and Robert V. Lesnak and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110. Cases 6-CA-7509(E) and 6-CA-7770(E)

14 June 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

This case¹ raises two questions concerning the eligibility of a corporation seeking an award of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA); NLRB Rules and Regulations, § 102.143: (1) whether accumulated depreciation may be considered in calculating the net worth of a corporation and (2) whether a corporation must meet both EAJA criteria, i.e., its net worth is \$5 million or less and it has not more than 500 employees.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Consistent with the judge's supplemental decision, we conclude that accumulated depreciation may not be used to determine a corporation's net worth; that net worth is determined by subtracting total liabilities from total assets; and that assets are valued exclusively at their acquisition cost, not at their fair market value. The Respondent's net worth, therefore, exceeds the EAJA qualifying standard of \$5 million.

The Respondent excepted to, *inter alia*, the judge's failure to find a corporation is eligible for an EAJA award if it meets but one of the two EAJA standards, that is, its net worth is \$5 million or less and its employee complement is less than 500 employees. The Respondent contends that, because it has less than 500 employees, it qualifies for relief under EAJA. We find no merit to the Respondent's contention. EAJA defines a "party" eligible for reimbursement of legal fees and expenses as "[a] corporation . . . but excludes (i) any . . . corporation . . . whose net worth exceeded \$5,000,000 at the time the adversary adjudication was initiated . . . and (ii) any . . . corporation . . . having more than 500 employees at the time the adversary adjudication was initiated." 5 U.S.C. § 504(b)(1)(B). The Board's Rules and Regulations define as eligible corporations those "with a net

worth of not more than \$5 million and not more than 500 employees." NLRB Rules and Regulations, § 102.143(c)(5). The plain language of 5 U.S.C. § 504(b)(1)(B) and our rules shows that a corporation must have a net worth of \$5 million or less and not more than 500 employees to be eligible for an EAJA award from the Board.² As a corporation must satisfy *both* criteria to be eligible for an EAJA award in proceedings before the Board and as the Respondent's net worth exceeds the statutory limit, the judge properly found the Respondent ineligible for an EAJA award. Accordingly, the Board has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of Respondent W. C. McQuaide, Inc. for attorney fees and expenses under the Equal Access to Justice Act is denied, and the confidential financial statement attached to and incorporated in the Respondent's application for fees³ shall be sealed and withheld from public disclosure, under the provision of 29 CFR §102.147(g) (1982).

² A parallel statute, Title 28, provides for reimbursement of fees and expenses incurred in civil actions "brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action." 28 U.S.C. § 2412(a). The Title 28 EAJA applicable to court proceedings defines an eligible party as "a . . . corporation . . . whose net worth did not exceed \$5,000,000 at the time the civil action was filed . . . or . . . a . . . corporation . . . having not more than 500 employees at the time the civil action was filed . . ." 28 U.S.C. § 2412(d)(2)(B). We need not analyze why the two EAJA statutes, although seemingly similar, contain different conjunctions. We merely note the distinction and abide by the plain language of Title 5, the statute applicable to our proceedings.

³ The Respondent filed directly with the Board a "Motion for Leave to File an Alternative Net Worth Exhibit," in which it seeks to submit a net worth statement for 24 September 1974 when the original complaint issued. The Respondent's application, however, is for fees and expenses incurred in litigating a backpay proceeding. Sec. 102.143(d) of the Board's Rules and Regulations provides that "[f]or the purpose of eligibility, the net worth . . . of an applicant shall be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of the hearing in a backpay proceeding." Because the Respondent is seeking attorney fees and expenses in connection with the litigation of the backpay proceeding, the appropriate date for determining the Respondent's net worth is the date the backpay notice of hearing issued. As the notice of hearing issued on 7 May 1981, it is the 1981 date, for which the Respondent filed its original net worth statement, rather than the 1974 date, that is the only appropriate date for determining whether the Respondent is eligible for an EAJA award. Accordingly, we deny the Respondent's motion.

SUPPLEMENTAL DECISION ON APPLICATION FOR AWARD OF ATTORNEY FEES AND EXPENSES

BENJAMIN SCHLESINGER, Administrative Law Judge.
The General Counsel moves to dismiss on various grounds the application of W. C. McQuaide, Inc. (Re-

¹ On 7 June 1983 Administrative Law Judge Benjamin Schlesinger issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

spondent) for attorney fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. §504 (EAJA). I have considered only the contention that Respondent's net worth exceeds the sum of \$5 million; I find that it does and that Respondent is ineligible for any award under EAJA; and I grant the motion.

Section 504(b)(1)(B) of EAJA provides that an organization may be eligible for an award of attorney fees and expenses if its net worth did not exceed the sum of \$5 million at the time adversary adjudication was initiated.¹ See also Section 102.143(c)(5) of the Rules and Regulations of the National Labor Relations Board. Pursuant to Section 102.147(f) of said Rules, Respondent submitted a statement of its assets and liabilities, showing its net worth as \$2,260,048, arrived at by subtracting its total liabilities from its total assets. In computing this amount, there was deducted from its assets accumulated depreciation of property, plants, and equipment of \$3,638,093, which, if added to the "net worth," increases the latter figure to \$5,898,141, well in excess of EAJA's \$5 million limitation.

That increase is required, the General Counsel contends, because both the House and Senate Judiciary Committee Reports state that net worth shall be calculated by subtracting total liabilities from total assets and that assets should be valued at their acquisition cost rather than their fair market value. H.R. Rep. No. 96-1418 at 15, House Judiciary Committee Report on S. 265 (Sept. 26, 1980); S. Rep. No. 96-253 at 17, Senate Judiciary Committee Report on S. 265 (July 20, 1979).

Three administrative law judges have uniformly agreed with the General Counsel's contention. *Malcomb Boring Co.*, JD-(SF)-80-82; *Sentle Trucking Corp.*, JD-54-83; *Glenmar Cinestate, Inc.*, JD-171-83. These decisions concluded that Congress' failure to refer to depreciation was purposeful; that Congress meant what it said; that Congress opted for a simple and readily verifiable method to compute that value of an organization attempting to utilize EAJA; and that Congress did not desire that EAJA applications become bogged down either with contested appraisals of the fair market value of property or with determination of the propriety of different methods of depreciation, such as straight line, declining balance, double declining balance, or sum-of-the-year's digits.

The enactment of EAJA was admittedly an experiment, altering the normal American rule which provides that any party to litigation, successful or unsuccessful, pays its own legal expenses. H.R. Rep. 96-1418, *supra* at 13. In setting up the experiment, Congress established the rules, including who should be entitled to obtain the benefits of EAJA. I agree with the cited decisions that there is nothing in the rules established by Congress that per-

mits the use of depreciation to reduce an organization's net worth.

Instead, the legislative indicates to the contrary. By rejecting the notion that assets could appreciate in value, Congress made a judgment that it was disinterested in an organization's actual market value for the purposes of qualifying under EAJA. Because appreciation could not be utilized, the most that any asset could be worth is its acquisition cost. If Congress rejected actual fair market value as a gauge for evaluating an organization's net worth, it seems improbable that it intended to permit the use of the more unrealistic accounting method of depreciation.² For example, Respondent, a trucking firm, has fully depreciated many of its trucks which, according to its accounting statement, have no value. Yet, they clearly have some value, perhaps greater to Respondent than on the open market; but Congress has stated that market value may not be used, which results in a choice between one of two alternatives: the cost of acquisition, inflated because most assets lose value the moment they are brought, or a depreciated amount, which is merely a tax accounting concept. By omitting any reference to depreciation, I conclude that Congress intended that only the acquisition cost basis may be used.

Respondent contends that this is inequitable, but I find that it is merely the result of Congress' choice between various options. EAJA was intended to protect smaller organizations from the burden or unjustified legal action by the Government. Congress' selection for EAJA coverage of only organizations with net worths of less than \$5 million does not appear particularly significant. Congress could just as well have picked net worths of \$6 million or \$2 million; but, because of the choice that Congress made, organizations with \$1 more than \$5 million net worth may believe the law wholly unfair, and those with \$1 dollar less may believe the law amply justified. Similarly, the failure to utilize depreciation or market value may not favor organizations with heavy investments in machinery or property which does not appreciate in value; but a real estate company may benefit from excess appreciation and still be covered under EAJA.

The point is that Congress established a cutoff amount and the way that assets should be valued. By mandating the use of acquisition cost, Congress chose a simple method to value assets in order that administrative agen-

¹ In *Fibourg Navigation Co. v. Commissioner*, 383 U.S. 272, 276-277 (1966), the Supreme Court stated:

In *United States v. Ludey*, 274 U.S. 295, 300-301, the Court described depreciation as follows:

"The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost."

See also *Detroit Edison Co. v. Commissioner*, 319 U.S. 98, 101. In so defining depreciation, tax law has long recognized the accounting concept that depreciation is a process of estimated allocation which does not take account of fluctuations in valuation through market appreciation.

² The proceeding heard by me involved solely the issue of backpay under and compliance with the Board's earlier decision in 220 NLRB 593 (1975), 237 NLRB 177 (1978), and 239 NLRB 671 (1978). The parties have apparently assumed that the backpay proceeding, which commenced on May 7, 1981, is separate and distinct from the underlying unfair labor practice proceeding, which was instituted on September 27, 1974. Thus, no question has been raised as to the propriety of Respondent's submission of a statement of its financial condition as of April 30, 1981.

cies and the courts might more expeditiously cross the hurdle of establishing an organization's eligibility under EAJA and deal with the gist of the proceeding—whether the organization was adversely affected by unjustified and unreasonable Government prosecutions which EAJA was partially intended to remedy by reimbursing legal fees and expenses to the prevailing party.

On the foregoing findings and conclusions and on the entire record, I issue the following recommended³

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The application of W.C. McQuaide, Inc. for attorney fees and expenses under the Equal Access of Justice Act is denied; and the confidential financial statement attached to and incorporated in Respondent's application for fees shall be sealed and withheld from public disclosure, under the provisions of 29 CFR § 102.147(g) (1982).

Board and all objections to them shall be deemed waived for all purposes.